

11 BE IT REMEMBERED That the above-entitled cause came
12 regularly for hearing in the Circuit Court of the State
13 of Oregon, County of Multnomah, continuing Thursday,
14 March 11, 1999, before the Honorable ANNA J. BROWN,
15 Circuit Court Judge, and a jury, AM SESSION.

18 Messrs. James Coon, William A. Gaylord,
Raymond F. Thomas, and Charles S. Tauman,
19 Attorneys at Law,
On Behalf of the Plaintiff;

21 Messrs. James L. Dumas Michael Harting,
Billy Randles, Walter Cofer, Pat Sirridge,
22 and Jay Beattie, Attorneys at Law,
On Behalf of the Defendant.

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3 MR. DUMAS: James Dumas for defendant Philip
4 Morris, Incorporated.

5 Briefly, Your Honor, for the record, I would
6 like to place into the record by way of supplemental
7 argument, if you will, defendant's position regarding
8 plaintiff's motion to admit financial condition evidence
9 on the matter of punitive damages.

10 I realize the court has ruled, but I would like
11 to augment the record on this point. It's the
12 defendant's position, Your Honor, that the admission of
13 financial condition evidence of financial data would be
14 violative of defendant's constitutional rights of due
15 process primarily.

16 We believe the introduction of this evidence
17 will compromise the defendant's ability to obtain a fair
18 trial in this matter, that despite the court's best
19 cautionary instructions what we believe is likely is that
20 the jury's evaluation of the liability and the
21 compensatory damages portions of this trial would be
22 swayed unduly by the financial data, particularly given
23 the numbers involved, because of the financial condition
24 of the defendant, in that we believe that the
25 introduction of this kind of evidence at this phase in

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1 the trial unduly focuses the jury's attention on the
2 wealth of the defendant rather than the conduct of the
3 defendant.

4 In addition, Your Honor, while I appreciate
5 that this has been discussed in several Supreme Court
6 opinions, there is still the issue, I believe, of the
7 excessive fine issue under Oregon Constitution,
8 Article I, Section 16 and the U.S. Constitution the
9 Eighth Amendment.

10 The Oregon provision statutory scheme, of
11 course, now allows or requires 60 percent of any punitive
12 damages award go to the state. I believe that
13 significantly elevates the extent of state action such as
14 to call into question the constitutionality of such a
15 large fine, a quasi-criminal fine going to the state of
16 Oregon, yet having procedural safeguards that are limited
17 to basically the procedural safeguards that exist only in
18 a civil case rather than a criminal case.

19 And third, Your Honor, we believe that the
20 post-verdict review process is insufficient. I'm, of
21 course, aware of the Oregon statute and the recent cases
22 that have interpreted the post-verdict review process.

23 It is the defendant's position that that
24 post-review process as set out in the Oregon statute
25 really focuses in on what a reasonable juror -- in

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1 determining the appropriate amount of the fine or the
2 punitive damages, what a reasonable juror might do, and
3 we believe that is insufficient.

4 We believe that that statute, in essence,
5 abrogates the court's responsibility to determine what is
6 fair and appropriate punishment based upon the conduct to
7 the jury, and we believe that an appropriate remitter
8 process to evaluate the appropriateness of the amount of
9 any punitive damages should be a court function, not
10 pegged or established to what a reasonable juror might do
11 under the circumstances.

12 And frankly, I raise this next point, Your
13 Honor, somewhat out of confusion. The building
14 structures indication in Oregon, the Oregon Supreme Court
15 opinion has a lot of money language about when it is a
16 defendant must raise the potential excessiveness of any
17 award of punitive damages.

18 And there's language in that case that can be
19 interpreted to mean that this issue must be brought to
20 the court's attention literally before the verdict is
21 entered. And I raise that as a precautionary issue that
22 the defendant is concerned about the procedural mechanism
23 in this state by which excessiveness of verdict is raised
24 and I'm raising it at this point even though it's
25 obviously pre-verdict.

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1 Finally, Your Honor, related to the first
2 argument I made, I think simply under an old-fashioned
3 403 analysis the probative value of net worth and profit
4 evidence is really outweighed by its prejudicial value at
5 this stage in the proceeding. We believe that the
6 purpose and thrust of punitive damages, of course, is
7 to -- is based on the policy of rational deterrence and
8 that human nature being what it is, the kinds of numbers
9 we're talking about would likely not allow the jury to
10 base any kind of punitive damage award on rational
11 deterrence.

12 Thank you.

13 THE COURT: May I ask some questions, because
14 some of this is new to me. In regard to your first
15 point, you made the argument that you made some statement
16 in passing that the amount of the defendant's wealth or
17 the dollars involved are so excessive as to give rise to
18 a due process challenge. There is nothing in the record
19 that I'm remembering -- and maybe it was presented in
20 motions a while ago -- but I don't have any present
21 awareness of what the defendant's wealth is, so it's very
22 hard for me to consider that argument in a vacuum.

23 MR. DUMAS: Yes, Your Honor. I'm simply
24 raising it now because I anticipate, based on what
25 counsel advised me yesterday, I'm assuming they will call

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1 in a economist this morning and I --

2 THE COURT: Do you want to tell me what the
3 wealth issue is that I'm to consider, or am I not to
4 consider it in light of your argument?

5 MR. DUMAS: Your Honor, I don't know what the
6 evidence is going to be on that point. I'll have to wait
7 and hear that, but I can tell the court that its going to
8 be substantial. It's going to involve a lot of money,
9 and I believe under any analysis I believe that the
10 amount is going to be such that it will have the impact
11 that I described.

12 THE COURT: Well, I can't evaluate that
13 argument in a vacuum, and in the absence of evidence,
14 it's impossible for me to consider whether the degree of
15 the defendant's wealth is so great as to make impossible
16 a fair trial on the issue preemptively. There's just no
17 way I can consider that issue on the merits.

18 MR. DUMAS: I understand the court's position,
19 and I'll go ahead and indicate for the record for
20 purposes of this motion only that the most recent 8-K
21 filings by Philip Morris with the Securities and Exchange
22 Commission indicates that for calendar year ending 1998,
23 the operating revenues for Philip Morris, Incorporated
24 was \$15,310,000,000, that the operating income for Philip
25 Morris, Incorporated for 1998 was 1,489,000,000.

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1 THE COURT: Well, I think to say that that is a
2 substantial -- to use the word "substantial" to describe
3 that level of wealth is probably an understatement. I
4 think that's obvious. But compared to what, I guess, is
5 what I have to say in response to your primary challenge.

6 I think first, historically we have to look at
7 the stated punitive damage law in Oregon. It's my
8 belief -- and I want anyone to correct me if I'm reciting
9 this incorrectly -- but our statute ORS 18.537 and
10 ORS 30.925 were passed in light of United States Supreme
11 Court and Oregon Supreme Court decisions about what was

12 necessary to have a constitutional punitive damage
13 legislative policy in this state.

14 So I don't make the law, I'm not allowed to
15 rewrite it. It's irrelevant what I might think about it.
16 But the statute itself is an expression of what I believe
17 the highest court of our state and the highest court in
18 the land has determined is a constitutional approach to
19 punitive damages. So I think I need to assume the
20 constitutionality of our statutory standards.

21 And with that assumption in place, I cannot say
22 that preemptively it violates any parties' due process
23 rights to proceed with evidence of wealth in support of a
24 plaintiff's claim for punitive damages on the record we
25 have in this case. So I don't think I can address any

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1 better than that the due process argument.

2 I obviously cannot address an argument about an
3 excessive fine, because it's speculative at this point to
4 consider, first of all, whether the jury will exercise
5 discretion to award punitive damages, and if they
6 exercise that discretion, whether they will do it in a
7 way that falls outside the statutory parameters of a
8 rational juror set forth in Subsection (2) of ORS 18.537.

9 The procedural safeguards that the statute
10 incorporates, as I say, have been deemed constitutional
11 by the two highest courts I know of which might control
12 this proceeding, so prospectively I can't say anything
13 about the argument and an excessive fine. It's just
14 premature for me to consider it.

15 If the defendant wants to challenge our statute
16 which says the standard which the court would have to
17 apply in reviewing punitive damages, if any, are awarded
18 by a jury, the defendant wants to challenge the standard
19 of a rational juror is certainly something you can do,
20 but I again cannot do it -- consider it on the merits
21 preemptively, because I have to assume its
22 constitutionality in light of its history.

23 And finally, with regard to the argument that
24 introducing evidence of the defendant's wealth would
25 violate Rule 403, ORS 30.925 makes mandatory the

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1 consideration of, among other things, the financial
2 condition of the defendant.

3 ORS 30.925 says in Subsection (2), "Punitive
4 damages, if any, shall be determined and awarded based
5 upon the following criteria." That's not discretionary.
6 I'm required to instruct the jury on these criteria.

7 It would be meaningless to instruct the jury on
8 a criteria of the financial condition of the defendant if
9 there was no evidence of the financial condition of the
10 defendant. I don't have any discretion to exercise --
11 there is no 403 balancing that can happen here, it's a
12 mandatory rule.

13 So with regard to the defendant's wealth and
14 the profitability of defendant's misconduct, which I
15 think are two of the criteria in this particular statute
16 which relate to money, 403 is not a competent objection.

17 Is there anything else you need to put on the
18 record?

19 MR. DUMAS: No, Your Honor.

20 THE COURT: Does the plaintiff want to
21 supplement the record at this point?

22 MR. GAYLORD: Very slightly, I think, Your

23 Honor.
24 Permit me to say this, and not really for
25 response, but just that I'm -- I find it very interesting

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1 that there could be an argument that a defendant is so
2 rich that it would be prejudicial to tell the jury how
3 rich they are in a case where the question is
4 proportional deterrence. I'm not going to dwell on that
5 any further, I just think that's an interesting idea.

6 The argument that was made about the state
7 interest in the punitive damages, I want to comment on
8 that just in this respect: In the long run, the
9 plaintiff doesn't necessarily disagree that there is a
10 constitutional issue in the state taking 60 percent of
11 the plaintiff's case without compensation process, or due
12 process, but that's not here, and it's not between these
13 parties, and so that, you know, there may come a time
14 where that issue has greater interest. It doesn't
15 support the argument that's been made. And I'll just say
16 for the record we disagree respectfully but emphatically
17 with all the arguments that have been made.

18 In the interest of bolstering the record or
19 supporting the record, I believe one of the places where
20 the U.S. Supreme Court has specifically looked at the
21 criteria that are embodied in 30.925 is in the case
22 called Haslip vs. Pacific Indemnity where the state
23 Supreme Court of Alabama had created as a court rule
24 essentially the same seven-part test for criteria for
25 reviewing punitive damages as our statutory scheme, and

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1 the Supreme Court specifically looked at that on a
2 substantive due process review, and held that was a
3 proper and appropriate set of criteria for punitive
4 damages awards.

5 In concurring opinion, I think it was
6 Justice O'Connor said that the only problem with that is
7 it would be a lot better if that was given to the jury in
8 advance of their decision to award punitive damages.

9 THE COURT: Which we do.

10 MR. GAYLORD: Which we do. So I think there's
11 plenty of support. And of course our Supreme Court has
12 looked at that question and applied that statute, and I
13 think we have both state and U.S. level review in support
14 of the criteria that we give the jury, including the
15 financial review.

16 There's an opinion in California that actually
17 holds that it's -- the punitive damages award cannot be
18 sustained if it was not supported by evidence of the
19 defendant's financial condition. That has not been the
20 ruling in Oregon, but that's an interesting extension of
21 that rule.

22 So I think we're well on board all the
23 constitutional tests to be doing what we're proposing to
24 do.

25 THE COURT: Are you ready for the jury?

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1 MR. DUMAS: (Nods head).
2 THE COURT: All right, bring them in, please.
3 (Jury in, 9:30 a.m.)
4 THE COURT: Good morning, jurors.
5 A JUROR: Good morning.
6 THE COURT: Plaintiff's next witness.
7 MR. THOMAS: Plaintiff calls Michael Williams.

8 THE COURT: All right.
9
10 MICHAEL WILLIAMS
11 was called as a witness herein, after being first
12 duly sworn, was examined and testified as follows:
13
14 THE CLERK: Please be seated. And if I can
15 have you pull right up to the microphone, please.
16 And please state your name, spell your first
17 name and your last name.
18 THE WITNESS: Michael Williams, M I C H A E L,
19 W I L L I A M S.
20 THE COURT: Go ahead, Mr. Thomas, please.
21 MR. THOMAS: Thank you, Judge.
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1 DIRECT EXAMINATION
2 BY MR. THOMAS:
3 Q. Mr. Williams, are you related to this lady here,
4 (indicating)?
5 A. Yes, I am.
6 Q. And what is the relation?
7 A. My grandmother.
8 Q. All right. So that you're Jesse Williams'
9 grandson.
10 A. Yes.
11 Q. Okay. Let's give the jury a little orientation.
12 How old are you?
13 A. 24.
14 Q. And did you ever live with your grandma and your
15 grandpa?
16 A. Yes, I did.
17 Q. Okay. See, if you were -- if you're 24 now, in
18 '99. How recently did you live with your grandma and
19 grandpa?
20 A. Approximately 1990 was the last time.
21 Q. Okay. So you were with them basically until you
22 were about 16 years old?
23 A. Yes.
24 Q. Okay. And did your -- I guess I'll just ask you a
25 few preliminary questions.

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1 Did your dad live here in Portland, but your
2 mom in Atlanta?
3 A. Yeah.
4 Q. So did your dad and your family live with your
5 grandma and grandpa while you were a young man and up
6 until 16 years old?
7 A. Yes.
8 Q. Okay. And were you about four to five years old
9 when you moved in with your grandma and grandpa?
10 A. Yeah, about that.
11 Q. So did you all live in the same house?
12 A. Yeah, we did.
13 Q. Okay. Another few background things:
14 You went to Grant --
15 A. Yes.
16 Q. -- High school?
17 A. Uh-huh.
18 Q. Okay. And you left Grant early with a GED to go

19 study where?
20 A. PCC.
21 Q. Okay. And what did you study there?
22 A. Computer programming.
23 Q. Okay. Now, are you in between jobs right now?
24 A. Yes, I am.
25 Q. And where did you last work? And tell the jury

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1 about what it is that you're hoping to do for your next
2 job or your career if it works out.
3 A. I worked for Record Masters, which is a medical
4 records distribution company, and I actually planned on
5 attending that again.
6 Q. And is that a -- is that warehouse work, high
7 production warehouse work?
8 A. Yeah, basically.
9 Q. So is that the type of company that takes the
10 thousands of pages of medical records and gets them into
11 boxes and into the big warehouse and palletted and use a
12 forklift in the warehouse, that sort of thing?
13 A. Yeah.
14 Q. Okay. Now, I know that the defendants took your
15 deposition in December and you were here, working there
16 then.

17 Are you living down in California now?

18 A. Yes, I am.
19 Q. Okay. And you are up here to testify because we
20 asked you to come up; is that right?
21 A. Correct.
22 Q. All right. I'd like to go back in time. And
23 maybe for the jury it would be easier to talk about this
24 in terms of whether it was before or after 1990, when
25 your dad and you moved out of your grandma and grandpa's

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1 house.
2 Let's see, the house at 35th and Ainsworth, did
3 you guys live with your grandma and grandpa there?
4 A. No.
5 Q. Okay. So was it in the move to this house that
6 you no longer lived with them?
7 A. Yes.
8 Q. Okay. Now, just to give the jury an idea of the
9 kind of contact you had with them, how often would you go
10 over to see your grandparents after you moved out in
11 1990?
12 A. Pretty frequently, so I'd see my grandma two or
13 three times a week sometimes.
14 Q. And did that involve overnights, sometimes?
15 A. Yeah, it did.
16 Q. Would it be fair to say in your life your grandma
17 and your grandpa were basically in your life daily until
18 1990?
19 A. Yes.
20 Q. And did your grandma, I guess, pretty much raise
21 you?
22 A. Yeah, she did.
23 Q. Okay. And your grandpa -- your dad lived there
24 too. So your grandpa didn't father you, but was he a
25 close person to you?

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1 A. Yeah, I seen him every day.
2 Q. Okay. And do you have brothers and sisters?
3 A. Yes, I do.

4 Q. How many?
5 A. Oh, I have three sisters and two brothers.
6 Q. Okay. So there's six kids all together.
7 A. Yeah.
8 Q. All right. Before 1990, when you all lived
9 together, did you like to hang around with your grandpa?
10 A. Yeah, I did.
11 Q. Tell the jury the kinds of things that you and
12 your grandpa would do. And I mean as they show the kinds
13 of things that he was interested in so we can get some
14 idea about that.
15 A. Sports.
16 Q. Okay.
17 A. Sports.
18 Q. Like what?
19 A. Basketball, a lot of basketball. Different
20 sports, but primarily basketball. He liked the Blazers,
21 so we watched a lot of games together.
22 Q. And were you a guy who liked to play basketball
23 too?
24 A. Yeah.
25 Q. And did you have a hoop at the place that you

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1 lived at before Ainsworth?
2 A. Yes, we did in the backyard.
3 Q. And would he show you that he could do a few
4 things too?
5 A. Occasionally, yes.
6 Q. Can you jump?
7 A. Can I jump?
8 Q. Yeah.
9 A. Yeah.
10 Q. What about him? Did he ever show you that he
11 could jump?
12 A. Yeah. I tend to think that's where I got mine
13 from.
14 Q. Was he pretty good?
15 A. Yeah, he was.
16 Q. What could he do?
17 A. He could jump. He could touch our ceiling in the
18 house, you know, a couple times, and come outside.
19 Q. Just touch it, or could he put both hands on it?
20 A. He placed both hands.
21 Q. Both?
22 A. Yeah.
23 Q. Okay. That was a pretty good leap, wasn't it?
24 A. Yeah, I thought it was.
25 Q. Okay. Did you have -- did you tag around with him

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1 when he ran errands?
2 A. Yeah, I did sometimes.
3 Q. And did you guys enjoy each other's company?
4 A. Oh, yeah.
5 Q. What did you call him?
6 A. Pops.
7 Q. And what did you call Mayola?
8 A. That's my Nana.
9 Q. Okay. You know that he was in the army.
10 A. Uh-huh.
11 Q. And he taught you a few words of Japanese, did he?
12 A. Yeah, he did.
13 Q. Was he somebody who was fluent in Japanese, or did
14 he have a few phrases?

15 A. Yeah, he said a few phrases. I'm sure he could
16 probably think of some more if he ever really thought
17 about it, but sometimes you impress your grandchildren,
18 and on a couple things, so he told me some things.
19 Q. Was he the kind of guy who was always talking, or
20 was he somebody who was a more quiet person?
21 A. Um, he talked about what he liked to talk about,
22 but he -- you know, sometimes he went in the house and he
23 would be quiet watching a game or watching TV, but if it
24 was something he liked to talk about, he definitely
25 talked.

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1 Q. Did you learn about how to get him talking?
2 A. Oh, yeah. Come in the house and talk about
3 sports.
4 Q. And then would that get him loosened up?
5 A. Oh, yeah. That sparked a big conversation.
6 Q. Did you -- before you moved out, did you
7 observe -- you know, I know you were 16, so I'm going to
8 move forward in time because you were not an adult then,
9 but do you remember times where cigarettes would get into
10 the picture in terms of him being unable to stay with
11 something, something that the two of you were doing
12 because he had to go smoke?
13 A. Yes, like, you know, if we were watching TV, or
14 I'd say we if were watching sports or something he'd have
15 to get up and go take a smoke a couple times, or perhaps
16 if we went out to go eat, you know, breakfast, which is
17 something we did regularly with my grandparents, I
18 noticed he'd go, you know, before -- actually before we
19 ate the breakfast he'd be outside smoking, and then after
20 we got done he'd go out and smoke again outside.
21 Q. What would he say before he left about -- if you
22 can remember the phrases or the phrase that he used?
23 A. About smoking?
24 Q. Yeah.
25 A. "Got to go take a smoke."

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1 Q. "Got to go take a smoke." Okay. "Got to go take
2 a smoke."
3 Did you help him sometimes when he was working
4 at the janitor job down next to Lincoln High School?
5 A. Yeah, I did help him out a couple times.
6 Q. All right.
7 And how about fishing? Did the two of you guys
8 ever do that?
9 A. Yeah, we did.
10 Q. Okay. Well, what I'd like to do now is to move it
11 back to the -- or I guess forward to the time where
12 Mayola Williams and Jesse Williams moved to the Ainsworth
13 house.
14 When you went over to the Ainsworth house, did
15 you see that your grandmother had developed some
16 difficulty in getting around because of her arthritis?
17 A. Yeah, she did. It progressed a little more by
18 that time.
19 Q. Tell the jury what kinds of tasks around the house
20 Jesse Williams did after they moved into the Ainsworth
21 house.
22 A. Oh, he maintained the house, like the yard, you
23 know, around the house and stuff, always out mowing the
24 lawn, doing garden, washing his car, of course, go out
25 and get the errands, you know, go shopping sometimes.

1 Q. And what about in the house? Was he somebody who
2 would do at least some of the cooking?
3 A. Oh, yeah, yeah.
4 Q. Would he do a fair amount of the cooking?
5 A. Yeah, he did pretty good. He was a pretty good
6 cook.
7 Q. He was pretty good?
8 A. Um-hum.
9 Q. Did he make breakfast for you sometimes?
10 A. Yeah, he did.
11 Q. Did he get a kick out of doing that?
12 A. I think so, because I liked his food a lot. The
13 way he cooked I liked, so sometimes he'd get up in the
14 morning and cook breakfast and leave some rice, eggs and
15 bacon for me, you know, and I'd get up and watch TV and
16 eat.
17 Q. Did the two of you like to watch TV together, like
18 cartoons and that, after he retired?
19 A. Yeah, we did.
20 Q. Okay. Do you ever remember some times where he
21 tried to cut down on -- well, let me back it up.
22 Did the two of you have conversations about
23 smoking cigarettes, like whether he should be smoking or
24 not smoking or anything like that?
25 A. No.

1 Q. Do you remember observing his efforts to either
2 cut down on smoking or quit smoking?
3 A. Well, like you say, when they moved to 35th I had
4 noticed some -- like the gum and, you know, some of the
5 type of the patch, you know -- well, see, I noticed that
6 where he normally kept his cigarettes at in the house, in
7 that spot which was primarily where he kept his things
8 at, his glasses, his keys, a couple times I come in and I
9 noticed the patch was there or the gum was there in that
10 place. So I figured it was his.
11 Q. The cigarettes weren't there, but the patch or the
12 gum were?
13 A. Yeah.
14 Q. Now, in terms of the cigarettes, are you a
15 cigarette smoker yourself?
16 A. No, I'm not.
17 Q. Do you remember, and could you identify from
18 these, (indicating), which cigarettes it was that he
19 liked to smoke?
20 A. Well, it was one of those red and white packs, and
21 also I remember the one in the middle.
22 Q. All right. So the Marlboro 100s, the Marlboro
23 Light 100s in the middle, and then the regular king-size
24 Marlboros on your left, right?
25 A. Uh-huh.

1 Q. Yes.
2 A. Okay.
3 Q. That was his brand, was it --
4 A. Yes.
5 Q. -- Marlboro? Okay.
6 How long did it go that the gum or the patches
7 were there on the kitchen table instead of the
8 cigarettes? How long did that last for?
9 A. I'm not quite sure.
10 Q. Was it a month, or a couple months, or --

11 A. I couldn't tell you the time. I seen it there,
12 and then I might not have just noticed it, but I did
13 notice when it was there.
14 Q. Was that the time there at the 35th Avenue house
15 where he quit smoking in the house?
16 A. Yes.
17 Q. And where would he go to smoke?
18 A. Outside.
19 Q. And you see that monitor there where the -- next
20 to the judge?
21 A. Oh, yeah.
22 Q. Where would it be that he'd go?
23 A. Um, outside by the garage probably, sometimes
24 maybe he'd walk down toward the end of the block or
25 something.

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1 Q. Would you go out with him when he smoked?
2 A. No, I might be outside sometimes and see him come
3 from inside the house outside, but I never went out there
4 with him to go smoke.
5 Q. Is that something that he did by himself?
6 A. Yeah.
7 Q. After they moved to the 35th Avenue house, did you
8 notice whether or not he had a cough like a smoker's
9 cough, I guess they call it?
10 A. Yeah, I did notice.
11 Q. And did that stay the same or did it get worse?
12 A. It progressed.
13 Q. Was your grandpa somebody who liked to sit around
14 or was he somebody who liked to stay busy?
15 A. I'd say he liked to stay busy.
16 Q. Was he a person who was sort of sloppy or was he a
17 person who was neat?
18 A. Oh, very neat, very neat.
19 Q. Did you ever get a chance to see him -- I don't
20 know what word to use -- did you ever get a chance to see
21 him really work, like when he was doing the janitor job
22 over at Lincoln?
23 A. Um, yeah, I helped him a couple times, so --
24 Q. How did he work?
25 A. When we got there, I'd ask him what could I do for

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1 him, you know, what could I do to help. And he'd say
2 something like: I'm going to be upstairs and start
3 vacuuming or something, so you can like start, grab some
4 garbage down here, whatever, he'd take off, and I'd do
5 what I was going to do.
6 Q. He'd just go do it.
7 A. Yeah.
8 Q. I took this picture, I just want to tell you,
9 about three -- well, now it's been about four weeks ago.
10 Does the yard look any different? Can you see
11 it? Does the yard look any different since your grandpa
12 died, in terms of if it's been kept up like he had?
13 Let me bring it over to you. Excuse me.
14 A. It looks pretty much the same. The grass is a
15 little brown, but, yeah, it pretty much looks the same.
16 Q. That's in the winter. What happened in the spring
17 in that yard?
18 A. Flowers.
19 Q. Where would they be? Here, let me just --
20 A. Along the bottom of the house, the bushes there in
21 front.

22 Right there.
23 Q. Right in there, (indicating)?
24 A. Uh-huh.
25 Q. He put those in?

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1 A. Yeah.
2 Q. Okay. I guess the one thing I do have more is did
3 he take pride in doing those things that did he around
4 the house?
5 A. I think so, uh-huh.
6 MR. THOMAS: Okay. No further questions.
7 MR. DUMAS: I have no questions of Mr.
8 Williams, Your Honor. Thank you.
9 THE COURT: Okay, thank you.
10 THE COURT: Plaintiff's next witness.
11 MR. THOMAS: Plaintiff calls Lowell Bassett.
12 THE COURT: All right.
13
14 LOWELL BASSETT
15 was called as a witness herein, after being first
16 duly sworn, was examined and testified as follows:
17
18 THE CLERK: Please be seated.
19 Mr. Bassett, if I can, once you get your files
20 up, if I can have you scoot in this way and a little bit
21 to your right so that all the jurors can see you, and can
22 you please then state your name and spell first name and
23 your last name.
24 THE WITNESS: Lowell Bassett, L O W E L L,
25 B A S S E T T.

28

1 THE COURT: Thank you. Counsel.
2
3 DIRECT EXAMINATION
4 BY MR. THOMAS:
5 Q. Good morning.
6 A. Good morning.
7 Q. Do you have water up there?
8 A. Yes, I do.
9 Q. I didn't call you Dr. Bassett. I guess I could
10 have, couldn't I have? You are a doctor, Ph.D.?
11 A. Yes.
12 Q. Could you tell the jury about your area and your
13 education?
14 A. I'm an economist. My education consisted of a
15 Bachelor of Science degree in mechanical engineering in
16 1959 from Carnegie Tech in Pittsburgh, Pennsylvania, a
17 master's degree in economics in 1964 from Purdue
18 University in Lafayette, Indiana, and a doctor of
19 philosophy degree in economics in 1966, also from Purdue
20 University.
21 Q. And a doctor of economics Ph.D. is the next level
22 above a master's level?
23 A. Correct.
24 Q. And it wouldn't be disrespectful for me to call
25 you Mr. Bassett as opposed to Dr. Bassett?

29

1 A. No.
2 Q. Okay. Have you been an economist for about 33
3 years?
4 A. Yes. When I graduated from Purdue University I
5 went to the department of economics at the University of
6 Washington, and I was a professor there for 27 years from

7 1966 to 1994. And since I retired from the University of
8 Washington I've been doing economic consulting work.
9 Q. Have you also participated in addition to
10 teaching, economic research?
11 A. I have. I've published I believe 16 papers in
12 professional journals.
13 Q. And have you been the director of the Institute
14 for Economic Research at the University of Washington?
15 A. Yes.
16 Q. Do you serve as a consultant to government and
17 private firms?
18 A. I have, yes.
19 Q. And I guess just for clarity sake, I'm going to
20 back up a minute.
21 The level of students you taught when you were
22 a professor before you retired at the university, was
23 that undergraduate as well as graduate students?
24 A. Yes, it was.
25 Q. Thank you.

30

1 And what type of courses did you teach while
2 you were in your teaching phase in your career?
3 A. I taught economic theory, both micro- and
4 macro-economic theory. Micro-economic theory is where we
5 look at the individual entities that make up the economy,
6 such as the consumer, the firm, or particular markets,
7 and macro-economics looks at the big picture. It looks
8 at the economy as a whole and considers such things as
9 interest rates, inflation, gross national product.
10 I also taught business statistics and
11 mathematical economics.
12 Q. In connection with your work as a consultant, have
13 you worked with governmental agencies?
14 A. I have.
15 Q. And could you describe the type of work that you
16 have done? And I don't mean an exhaustive list, but just
17 to give the jury an idea of the kinds of things you've
18 done with the government?
19 A. Well, I've done work for agencies in the state of
20 Washington, such as King County, the City of Seattle, the
21 Attorney General's office, and the state of Washington.
22 I've worked with the Attorney General's office in other
23 states. And at the federal level I've worked for the
24 Federal Aviation Administration and the United States
25 Army.

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1 Q. In regard to the kind of consulting work that
2 you've done for local and national firms and businesses,
3 could you give the jury an idea of that?
4 A. Well, some of it had to do with economic studies
5 of regional growth in the King County area. Others have
6 involved various types of litigation that these agencies
7 or government units were involved in.
8 Q. Do economics and economic analysis get involved in
9 litigation sometimes such that experts are asked to come
10 in to present information about economic models, net
11 worth, those kinds of things?
12 A. Correct.
13 Q. And have you had experience being recognized as an
14 expert in court on the question of economics in order to
15 present economic information to juries and courts?
16 A. I have.
17 Q. Did you get consulted with and retained by our

18 firms in this case in order to present economic analysis
19 at the appropriate time on this particular case?

20 A. Yes, I did.

21 Q. And could you give the jury an idea about the
22 types of materials that you examined in order to come up
23 with some of the opinions that they will be hearing
24 today?

25 A. I examined the annual reports of Philip Morris

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1 Companies going back to the 1960s. I examined government
2 publications on cigarette smoking. I looked at various
3 economic articles which had data on the cigarette
4 industry, and I analyzed that information, I looked at
5 stock market information on Philip Morris Companies.

6 Q. Are these the kinds of things that an economist
7 looks at in terms of reference sources to establish the
8 net worth and the profitability of a company?

9 A. Yes, it is.

10 Q. As opposed to some of the documents that we've
11 seen in this case, were the things that you consulted
12 public documents? In other words, were they available
13 for the public to examine?

14 A. Yes, they were.

15 Q. Were some of the documents ones that Philip Morris
16 had put forward for the public to examine, such as, for
17 example, if they'd like to buy some stock?

18 A. Correct. The annual report would be something
19 that's published for the stockholders every year.

20 Q. And is the annual report for Philip Morris
21 something that's filled with positive statements, color
22 photographs, those kinds of things?

23 A. Well, yes. I think it's designed to present the
24 company and its operations in a very favorable light.

25 And I'm not just talking about Philip Morris, any annual

33

1 report would present the same type of information and try
2 to advertise the company favorably.

3 Q. All right. And in this case -- and this is a
4 preface to the next series of questions -- it has been
5 determined that the question of worth, value,
6 profitability of Philip Morris can and will be considered
7 by the jury in connection with the issue of assessment of
8 punitive damages.

9 MR. DUMAS: Objection, Your Honor. That is an
10 incorrect statement of the law.

11 THE COURT: Let me take -- let me explain to
12 the jury the purpose for which you're about to hear this
13 evidence:

14 In the plaintiff's claim, the estate is seeking
15 compensatory damages in the form of economic damages and
16 noneconomic damages. Those have to do with the
17 out-of-pocket expenses incurred by the estate for the
18 treatment of Mr. Williams and his funeral expenses, and
19 the noneconomic damages are the nonmonetary losses
20 incurred by way of loss of the relationship with
21 Mr. Williams, and his own pain and suffering.

22 In addition to compensatory damages, the estate
23 is seeking punitive damages. And punitive damages are
24 something I'll discuss with you at the end of the case
25 when I give you legal standards about which to conduct

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1 your deliberations.

2 One standard by which punitive damages may be

3 considered is the wealth of the defendant against whom
4 punitive damages are sought and the profitability of the
5 enterprise about which the punitive damages claim is
6 concerned.

7 So the evidence you're about to hear has to do
8 with the consideration of punitive damages which
9 ultimately I'll give you a complete instruction on at the
10 end of the case. Anything else?

11 MR. DUMAS: On that issue, that's sufficient at
12 this time.

13 Q. (BY MR. THOMAS) In regard to the question of
14 punitive damages and the calculation from an economic
15 standpoint of some of the concepts that the court just
16 told the jury about, is that a procedure that you have
17 testified about on other occasions besides this one?

18 A. Yes, I have.

19 Q. And what I'd like to do in terms of -- this is
20 just background -- I'd like to focus on a couple of
21 concepts.

22 One is from an economic perspective, the
23 financial condition of the defendant, what does that
24 mean? And I know we're going to get into it in more
25 detail and with some charts in a few minutes. But just

35

1 to kind of give the jury an overview of what some of
2 these concepts mean, could you tell them about that,
3 please.

4 A. Well, there are probably two main measures of
5 financial condition, and first the net worth or how much
6 the company is worth.

7 And that would mean, for example, if you as an
8 individual, you have certain assets, you own a house that
9 is worth \$300,000, you have a mortgage on the house which
10 is a hundred fifty thousand dollars, your net worth in
11 your house then would be the difference between the value
12 of the asset, the house, and the liability, the mortgage
13 you have against the house, so your net worth in the
14 house would be a hundred fifty thousand dollars.

15 Similar concepts apply to a firm. We can, for
16 instance, look at the value of a share of stock of a
17 firm, multiply that by the number of shares outstanding,
18 and that would give us a market value or what is
19 sometimes referred to as a market capitalization of the
20 firm.

21 Now, that particular way of looking at the
22 value of the firm is a low value, because the shares that
23 are actually transacted in the market, for instance, if
24 there's two billion shares of the firm, there's probably
25 maybe one or two million shares that will be sold on any

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1 given day.

2 And so that doesn't measure the value of all
3 the shares, it just measure the value of the shares that
4 are exchanging hands each day. And generally, if you
5 want to buy the whole firm you have to purchase control
6 of the firm, and that control requires that you pay more
7 than what the current market price is for those few
8 shares that people are willing to exchange on any given
9 day. So on average, you can pay anywhere from 25 to 50
10 percent more for control on average than what the market
11 price of the shares are on a given day.

12 So if we use 25 percent as an example, if
13 shares are exchanging at \$40 a share, a 25 percent

14 premium would mean that on average you'd pay \$50 a share
15 if you wanted to buy enough shares to actually own the
16 firm. So the market value established from the current
17 share price gives you a very conservative value for the
18 firm.

19 The other thing people sometimes look at is
20 what are the profits of the firm? The profits would be
21 what's left over after the firm has paid all its expenses
22 in a given year. And so that just shows what the flow of
23 income left over after all expenses are in a given year.
24 And that flow of income of course is related to what the
25 value of the stock is.

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1 The more income the firm earns in a given year,
2 other things being equal, the higher the value of the
3 stock is going to be. So those are just two different
4 ways of looking at the value of a firm.

5 Q. Thank you. Now, I want to go backwards a second
6 and see how much of this is new and how much isn't.

7 Is Philip Morris a company that's traded on the
8 stock market in the U.S. with its shares?

9 A. Philip Morris Companies, Inc. is traded.

10 MR. DUMAS: Objection, Your Honor. I have a
11 matter for the court.

12 (Counsel conferring together.)

13 MR. THOMAS: I'll rephrase the question.

14 THE COURT: Before you do that, be sure the
15 witness is aware of the limitations of the testimony.
16 Would you just take a minute and speak with the witness?

17 MR. THOMAS: Yes.

18 MR. DUMAS: Thank you, Your Honor.

19 (Conferring with witness.)

20 MR. THOMAS: Okay.

21 THE COURT: All right, then, Mr. Dumas, you've
22 addressed your matter adequately for now? Do you need to
23 be heard or not?

24 MR. DUMAS: I would prefer to be heard now,
25 Your Honor. I think it would be better.

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1 THE COURT: All right. Let's go into chambers
2 for that, and while jurors, feel free to stretch, just
3 stay here, though. Give me just a minute.

4 (In chambers.)

5 MR. DUMAS: Thank you, Judge.

6 I'm concerned that while I know Mr. Thomas has
7 instructed the witness on the previous rulings of the
8 court, he's been spending time talking about shares of
9 stock and how stock can be traded. Well, Philip Morris,
10 Incorporated does not have stock and it doesn't trade
11 stock, it doesn't issue stock.

12 He's talked about Philip Morris Companies. And
13 that's not a party to this case, and it's going to cause
14 some -- could cause some confusion.

15 I am concerned that this witness is going to be
16 getting in areas which will communicate clearly to the
17 jury that there are other Philip Morris Companies,
18 larger, much larger companies than Philip Morris,
19 Incorporated, which is, as of course we discussed
20 previously, limited solely to domestic tobacco, and I'm
21 concerned about potential prejudicial impact on my client
22 of that.

23 THE COURT: And what is it you're asking of me?

24 MR. DUMAS: I'm asking that the plaintiff be

25 instructed to very clearly limit -- and maybe the court's

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1 already done this, but we've come so far, Judge, I just
2 don't want to do something, have something happen that's
3 going to cause a legal problem. That's all.

4 Maybe I'm being too cautious here, but I
5 just --

6 THE COURT: The court's ruling is the evidence
7 may proceed as to Philip Morris, Incorporated only, the
8 defendant in the action. The witness is not to be asked
9 questions that go beyond the scope of that.

10 Is there something you want me to do about
11 what's happened so far?

12 MR. DUMAS: I don't think so, Judge.

13 THE COURT: All right, let's proceed.

14 (Open court.)

15 Q. (BY MR. THOMAS) Now, in connection with the
16 analysis in this case, did I ask you to examine the
17 financial condition of the defendant in this case, Philip
18 Morris, Inc.?

19 A. Yes, you did.

20 Q. And did you do that?

21 A. Yes.

22 Q. And is the Philip -- is the evaluation of the
23 financial condition of a corporate defendant something
24 that you've done maybe once, twice, not very many times,
25 or is it the kind of thing you have done frequently and

40

1 as a regular part of your consulting business over the 33
2 years you've been doing this?

3 A. Well, it's something I've done reasonably
4 frequently, because it's not necessarily that it's a
5 defendant, it's just what is the value of a particular
6 corporation.

7 Q. Do you, when you testify in a case, or when you're
8 retained in a case, do you only, you know, consent to
9 consulting with plaintiff's lawyers?

10 A. No.

11 Q. Do you consult with the side of the bar that's
12 called defense lawyers?

13 A. Yes, I do.

14 Q. And do you work on behalf of corporations as well
15 as individuals?

16 A. Yes.

17 Q. Regularly?

18 A. Yes.

19 Q. All right. Well, let's go back to the questions
20 in this case. I'm going to ask you to assume for
21 purposes of your questioning today that the jury is going
22 to be given questions that relate to a number of
23 criteria. And there are six for this hypothetical but
24 we're only going to focus on two. And for purposes of
25 this series of questions --

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1 THE COURT: Mr. Thomas, would you bring me your
2 handout, please?

3 (Side bar conference.)

4 Q. (BY MR. THOMAS) All right. With the very
5 skillful -- what's that word, origami by me, I'd like you
6 to take a look at these six factors.

7 I'm going to ask you to assume for purposes of
8 your evaluation in this case that you're going to be
9 presenting evidence today in regard to two. One is the

10 profitability of the defendant's misconduct.
11 And in terms of profitability, have you
12 calculated the profitability of this defendant for the
13 year in which Jesse Williams died, 1997?
14 A. I have.
15 Q. And in addition, under question number six, did
16 you assess the financial condition of this defendant,
17 Philip Morris, Inc.?
18 A. I did.
19 Q. Now, in terms of assessing the financial condition
20 of Philip Morris, Inc., did you assess the current
21 financial condition as opposed to the financial condition
22 when Jesse Williams died?
23 A. I did.
24 Q. And does that relate to 1998 therefor?
25 A. Well, it actually relates to now, 1999.

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1 Q. All right.
2 A. As of this date.
3 Q. All right. That's right. Now, just as a
4 distinction that I want to point out, before we go any
5 further, if a person was to look at the profitability of
6 what Philip Morris did in regard to Jesse Williams, since
7 he died in 1997, would that be the proper end point for
8 that analysis?
9 A. Well, it would seem to me it could end at that
10 point, but it could go back to previous years.
11 Q. All right. And have you looked at other years of
12 profitability for Philip Morris, Inc.?
13 A. Yes.
14 Q. And in terms of the question of financial
15 condition, is that a here -- that's a here and now thing,
16 I think you said, that's as of 1999?
17 A. That's what I looked at. I mean, I could look at
18 past data, but you wanted to know what the financial
19 condition was today.
20 Q. Right now.
21 A. Yes.
22 Q. All right. Thank you.
23 Now, for purposes of the information that we're
24 going to be going through today, I want you to talk about
25 Philip Morris, Inc. only, all right?

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1 A. I understand.
2 Q. All right. And we've been here for a while in
3 this courtroom, so we know there are some ways that we
4 can present evidence efficiently, hopefully, so would you
5 please come over here?
6 A. (Complying).
7 Q. In terms of being time effective, I want you to
8 assume for purposes of these questions this case has
9 involved a lot of scientific and medical evidence, but
10 not economic evidence. So we haven't -- you're the first
11 financial witness, so we haven't seen a lot of evidence
12 involving some of these terms.
13 So as you go, please give us definitions, but
14 assume that we're smart so that you don't do it over and
15 over, just get it and move along.
16 Now, where shall we start? In terms of
17 communicating --
18 A. Perhaps the best place to start is for the jury to
19 understand a little bit about the number of cigarettes
20 sold in the United States in a given year and the market

21 shares of Philip Morris, Inc., and their most successful
22 brand, Marlboro.
23 Q. All right. And is that something that you'd like
24 to start on the chart, on that flip chart, or on a
25 diagram that you have prepared for us?

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1 A. I think on a diagram that I prepared for you.
2 Q. All right. Have you, in connection with your
3 work, compiled I guess it would be a table that shows the
4 United States cigarette market?
5 A. I have.
6 Q. And does it show the percentage of that market
7 that Philip Morris and their brand Marlboro has?
8 A. It does.
9 Q. All right. And does it show that in terms of a
10 number of different years so that the jury can see how
11 that has changed over time?
12 A. It does.
13 Q. All right. And would it assist you in explaining
14 this to the jury if you could use a pointer to your left
15 so that you don't have to get in the way of it?
16 A. Well, yes.
17 Q. Now, I've got -- for some reason today I've got a
18 glare on that television screen, so I'm going to turn it
19 slightly toward myself, because this is my reference
20 point.
21 Okay. Can you see that?
22 A. I can see it, yes.
23 Q. All right. Would you explain to us how this chart
24 works and what it shows?
25 A. Well, I've listed some years, going from 1983 to

45

1 1997, which was the most recent year that I had data on,
2 and first it shows what the total number of cigarettes
3 shipped in the United States were each year.
4 And for instance in 1983, it was 595 billion
5 cigarettes.
6 Q. Okay, hold it. Hold it right there. Are these
7 numbers all billions here?
8 A. Correct.
9 Q. All right. You've use decimal points here.
10 A. Yes.
11 Q. Okay. Would you please, just to get us oriented,
12 show us what the real number looks like so we can get
13 some comprehension of the number and size of it, please.
14 A. (Complying).
15 Q. And I'm sorry, I'm going to interrupt you here,
16 but I'm going to move this because I don't like it over
17 there. I just think it's too far over in the corner.
18 I like this better. I hope it's a little
19 easier to see. Okay.
20 A. So this would be hundreds, thousands, millions,
21 billions, so this number here with the decimal point
22 after it is 595 with nine zeros.
23 Q. And that is how many were sold in '83?
24 A. That's actually shipped.
25 Q. All right. But that's not for the world, that's

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1 for the United States?
2 A. Correct, just for the United States market.
3 Q. Okay. And if the jury is to sight down that
4 column, will they see it over time?
5 A. Yes. So in '85 it was the same number, and then

6 since then it's declined. So it was 521,600,000,000 in
7 1990; 481 billion in 1995; and 482,530,000,000 in 1997.
8 Q. And in regard to that calculation, and for that
9 matter perhaps the others, are these from documents that
10 are available in public?
11 A. Yes. These either came from the Philip Morris
12 annual reports or they came from a publication called
13 "Tobacco Reporter," which is an industry trade
14 publication.
15 Q. So would it be fair to say that these are numbers,
16 these are Philip Morris' own numbers for the most part?
17 A. Yes.
18 Q. Okay. Now --
19 A. And these are, when we get to the market share,
20 these are the lower market share numbers, because if you
21 look at sales instead of shipments, the percentages are
22 slightly higher for Philip Morris' market shares.
23 Q. Now, market share is something that we've heard,
24 maintaining market share, boosting market share. From
25 the standpoint of economic analysis, what does "market
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1 share" mean?
2 A. Well, it's the part of the market that you have,
3 so if you were talking about cheese, there's so many
4 pounds of cheese sold in the United States, and if a
5 particular company, say Kraft sold 10 percent of the
6 cheese, they would have a 10 percent market share.
7 Q. In regard to the -- there's a calculation for
8 Philip Morris and there's a calculation for Marlboro.
9 How are they different?
10 A. Well, Philip Morris sells other brands of
11 cigarettes besides Marlboro, and so the market share that
12 Philip Morris has in total is larger than just the market
13 share for Marlboro, because that's only one particular
14 brand among the brands that Philip Morris manufactures
15 and sells.
16 Q. All right. So we've got about 20 numbers there.
17 25 numbers.
18 Let's talk about broad trends just to orient
19 ourselves so the numbers have kind of a flow. Has the
20 U.S. total billions of cigarettes shipped number over
21 time declined from four -- 595 I guess at a high down to
22 481 in '95 to the present and then it's come up a little
23 bit, 482 billion?
24 A. Correct.
25 Q. Now, in regard to -- we're going to now divide
48

1 this up into percentages.
2 In terms of the Philip Morris market share, has
3 their market share gone up or down?
4 A. It's gone up from 34.4 percent to 48.7 percent.
5 Q. Okay. I just want to make sure, and then we'll go
6 on.
7 How could it be that the market share goes up
8 but the total number of cigarettes sold in the U.S. goes
9 down? What does that mean?
10 A. Well, the pie is getting a little bit smaller but
11 you've got a bigger cut of the pie, so if you had 50
12 percent of the market you'd have half of the pie. The
13 pie can change size.
14 Q. All right. Tell me if this is right or not, the
15 stake. From 1983 to 1997, while the U.S. cigarette
16 market went down somewhat, Philip Morris, Inc.

17 substantially increased its market share?
18 MR. DUMAS: Objection, Your Honor, leading.
19 Q. (BY MR. THOMAS) Is that correct or is that
20 incorrect?
21 THE COURT: Objection is sustained.
22 Q. (BY MR. THOMAS) Did the Philip Morris market
23 share increase over time in spite of the declining rate
24 of billions of cigarettes shipped?
25 A. Yes, it did.

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1 Q. To the point where in 1997, what was Philip
2 Morris' market share of the U.S. cigarette market?
3 A. 48.7 percent.
4 Q. So a little under half.
5 A. Correct.
6 Q. And how many billions of cigarettes did Philip
7 Morris ship in 1997?
8 A. 235 billion.
9 Q. Now, have you also conducted that analysis for the
10 Marlboro brand?
11 A. Yes.
12 Q. And has the Marlboro brand increased or decreased
13 its market share over time?
14 A. It's increased its market share.
15 Q. And in terms of whether or not Philip Morris has
16 one brand that predominantly -- well, that's not --
17 that's a bad question.
18 Is one brand the best for Philip Morris'
19 cigarette brands?
20 A. Yes.
21 Q. What is it?
22 A. It's Marlboro. In fact, the annual report talks
23 about that this is the best brand in the United States.
24 Q. In terms of sales?
25 A. Just uses that term.

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1 Q. All right.
2 A. I mean, this is their most well-known and
3 developed brand.
4 Q. Is this their flagship brand?
5 A. Yes.
6 Q. All right. Now, in terms of billions of Marlboros
7 that are shipped in the United States for this year of
8 1997, when Jesse Williams died, what was that?
9 A. It was just under a hundred sixty-four billion
10 cigarettes.
11 Q. So if we were to look at it from the change from
12 1983 to 1997 in billions of cigarettes, would it be fair
13 that it would go from a hundred twenty to almost a
14 hundred sixty-four billion?
15 A. Yes.
16 Q. Would you write that out for us, please, a hundred
17 sixty-four billion? And then put cigs, just C I G S is
18 fine.
19 A. (Complying).
20 Q. Thank you.
21 Do the contents of what is now marked and what
22 we've been discussing as U.S. cigarette market show an
23 accurate reflection of the information that you just
24 presented to the jury?
25 A. Yes, it does.

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1 MR. THOMAS: Move to admit Plaintiff's

2 Exhibit 170 for purposes of demonstrating its contents.
3 MR. DUMAS: If by that counsel means for
4 demonstrative purposes, no objection.
5 MR. THOMAS: That's correct.
6 THE COURT: It's received.
7 And Mr. Thomas, we'll have to take the morning
8 recess at a logical point.
9 MR. THOMAS: Okay. Let's do one more chart,
10 maybe.
11 Q. (BY MR. THOMAS) Did you prepare another chart
12 which shows defendant Philip Morris, Inc.'s income from
13 their -- I don't mean international, but domestic
14 tobacco?
15 A. Yes, I did.
16 Q. And does it also show several different years?
17 A. Yes, it does.
18 Q. And I'd like to, please, just for purposes of
19 getting it very briefly, operating revenues, what --
20 A. That's your sales, the total dollars you took in
21 for selling the product.
22 Q. And if I -- if you transfer this to like a working
23 person, would operating revenue be for a corporation like
24 job income would be for a working person?
25 A. Right. It would be what your salary is. If your
52
1 salary is \$35,000 a year, that's your sales, you're
2 selling your services to your employer, and your employer
3 is paying you \$35,000 a year.
4 Q. Reported operating income. What is that?
5 A. Okay, that's after you've taken off all the
6 expenses that are directly attributable to the product
7 that you're selling. So that would be the cost of the
8 raw materials, the cost of the labor, the cost of the
9 distribution of the product. Everything that you can
10 allocate directly to that production.
11 Q. So those are your costs?
12 A. Those are your costs. This is after costs.
13 Q. And then what's net profit from an economic
14 standpoint?
15 A. After you have your costs, you have such things as
16 interest that you pay for money that you've borrowed in
17 order to finance some of your operations, you have
18 general administrative overhead, which isn't necessarily
19 allocated directly to the product, it's sort of the
20 overall management of the company.
21 And that doesn't just work for one part of the
22 company, it works for the whole company, and therefore
23 you have to take a proportion of that, and then you have
24 the federal income tax --
25 Q. We're not going to go into taxes. All we want to
53
1 do is acquaint them with the concept and then -- well,
2 actually, I don't even want to get into the numbers yet.
3 I just want to get the categories.
4 What about profits as percentage of revenue?
5 Tell us what that is.
6 A. That's just taking what the net profit is here,
7 1.7 billion and dividing it by the revenue of
8 8.2 billion, and that gives you a profit percentage, 20.8
9 percent.
10 Q. That's for 1990.
11 A. Correct. So, in other words, after you've paid
12 all the expenses, you had a profit of 20 percent on

13 sales.
14 Q. And does this show what has happened over time to
15 Philip Morris, Inc.'s operating revenues for several
16 years in the 90s?
17 A. Yes.
18 Q. And they've gone up somewhat?
19 A. Well, they've gone up and down.
20 Q. All right. And as far as the reported operating
21 income, it has gone down somewhat?
22 A. Well, it's fluctuated.
23 Q. I guess --
24 A. Two years are four, and two years less than four
25 billion.

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1 Q. And in terms of profits as percentage of revenue,
2 is that sort of the -- what do you want to call it, the
3 bottom line --
4 A. Yes.
5 Q. -- for the analysis of, well, how good --
6 A. That's what's left over after you've paid all your
7 expenses.
8 Q. Now, before we go to the break, is profits as a
9 percentage of revenue something that economists study for
10 different companies?
11 A. Yes.
12 Q. And does that help you decide, well, how
13 profitable is one particular business for some product in
14 the grocery store compared to some other business in the
15 grocery store for which you might want to make a stock
16 purchase or something?
17 A. Yes.
18 Q. Well, and let's just give the jury a very brief
19 idea of what is to come in terms of a 16.25 percent
20 profits percentage. How does that look compared to some
21 of the other products that we see in the grocery store?
22 A. Well, as a percentage on sales, that's very high.
23 A lot of products you would see in a grocery store would
24 have profit rates that would be anywhere from two to 10
25 percent on sales.

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1 Q. And in terms of -- I guess now I'm going to put
2 you on the spot here because I want to do one calculation
3 before the jury goes, but without going to a table you've
4 got your calculator. What I'd like for you to do for
5 1997, just to give us a figure, give us what the profits
6 as a percentage of revenue were in that percentage for
7 1997, or maybe you don't even have to use a calculator.
8 It's under "net profit," isn't it?
9 A. Right.
10 Q. So 1.607 million -- or billion dollars.
11 A. Yeah, this is \$1,607,000,000.
12 Q. All right. Would you please write that on the
13 chart, and then put "1997 income"?
14 A. (Complying).
15 Q. And that would be their income in the year in
16 which Jesse Williams died; is that right?
17 A. That would be the net profit.
18 Q. Right. I'm sorry, I didn't say it right, did I?
19 All right. Net profit.
20 Thank you.
21 THE COURT: All right, jurors, we'll take our
22 morning recess. 15 minutes, please.
23 (Jury out, 10:35 a.m.)

24 (Open court, no jury.)
25 THE COURT: Anything for the record,

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1 plaintiffs?

2 MR. THOMAS: I don't think so, Judge.

3 THE COURT: Defense?

4 MR. RANGLES: Your Honor, if I may approach,
5 I'd like to hand a couple matters up.

6 I provided these to Mr. Coon yesterday, and he
7 indicated he would have some objections.

8 THE COURT: What is it, just in summary?

9 MR. RANGLES: Your Honor, they are the labeling
10 act, FTC corrections, and a couple of governmental --
11 they're all governmental actions, statutes.

12 THE COURT: Mr. Coon, is -- was here.

13 MR. RANGLES: He was here, and then left.

14 THE COURT: All right. I need to have him here
15 so we can figure out when we are going to address that.

16 (Jury in 11:00 a.m.)

17 THE COURT: All right. Mr. Thomas.

18 Q. (BY MR. THOMAS) Well, before the break, we were
19 talking about share and revenue. Now what I'd like to do
20 is ask you a few questions from the most recent year in
21 which a financial report is available, 1997.

22 In terms of how Philip Morris, Inc. was doing
23 in 1997, does the report say that their tobacco business,
24 domestic tobacco business continued to produce solid
25 profits?

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1 A. Yes.

2 Q. And they also state that they achieved record
3 shipment volumes for the third year in a row?

4 A. Yes, it does.

5 Q. And that their shipment share actually rose up to
6 48.9 percent?

7 A. That is correct.

8 Q. And they self-describe Marlboro as the world's
9 leading cigarette brand?

10 A. Yes, they do.

11 Q. And in '97, they got a five percent increase in
12 Marlboro? Did I say that right? I don't think I did.

13 In 1997, did they report that they rose five
14 percent?

15 A. The shipments rose five percent in the United
16 States to a hundred sixty-four billion cigarettes.

17 Q. And in terms of their retail, did their total
18 share hit a record 51 percent?

19 A. Yes, it did.

20 Q. This is probably clear now, but when we talk about
21 share in relation to market share, is that different from
22 share when we talk about in a stock market?

23 A. Yes.

24 Q. Two different concepts.

25 A. Correct. The shares in the stock market is what

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1 you pay for a share of a company.

2 Q. All right. If you could please come back down to
3 the monitor have you prepared a chart regarding Philip
4 Morris sinage, the defendant in this case, domestic
5 tobacco receipts and income?

6 A. I have.

7 MR. THOMAS: And counsel, I'm going to mark
8 that as -- well, for the record, the domestic tobacco

9 chart was 171. Move to admit for demonstrative purposes.
10 MR. DUMAS: No objection, Your Honor, for
11 demonstrative purposes.
12 THE COURT: Thank you.
13 MR. THOMAS: And for the domestic tobacco, that
14 will be marked as Plaintiff's 172.
15 Q. (BY MR. THOMAS) Dr. Bassett, would you please
16 describe the contents of this chart for the jury?
17 A. This shows -- and we discussed this briefly
18 before, this shows what the sales were from 1990, 1995,
19 1996, and 1997. They were 8,211,000,000 in 1990, and
20 they rose to 9,889,000,000 in 1997.
21 The operating income is after direct expenses.
22 The net profit is after all expenses. And the net profit
23 varied from a low of \$1,607,000,000 in the year to a high
24 of \$2,069,000,000 in 1996.
25 Q. Now, in terms of what this chart shows, it

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1 includes the same years that we had previously in the
2 90s, concluding with 1997?
3 A. Yes. You showed this just before the break.
4 Q. Oh, I see. All right.
5 MR. DUMAS: I think you marked the same thing
6 twice.
7 MR. THOMAS: I did. I marked the same thing
8 twice.
9 MS. DUMAS: Do you want to withdraw that,
10 Counsel?
11 MR. THOMAS: Yes, withdraw it and transfer.
12 You let me get so far with that. Okay. Let's
13 try again. I'm embarrassed.
14 THE WITNESS: That's the same one.
15 MR. THOMAS: I'm confused. Too many copies.
16 I appreciate you at least telling me that time
17 before I went further with it.
18 Q. (BY MR. THOMAS) All right. Let's try again.
19 172, profits as percentage of revenue. Now,
20 this one will not all fit on the door, because it's
21 printed this way. But let's just talk about it.
22 What are profits as a percentage of revenue?
23 A. Well, you can pull it up a little bit more because
24 it will fit. Right there. Pull it down, and blow it up
25 a little bit more.

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1 MR. DUMAS: Objection, Your Honor, relevancy.
2 MR. THOMAS: I'll lay a foundation.
3 THE COURT: Well, take it off the screen.
4 MR. THOMAS: Okay.
5 Q. (BY MR. THOMAS) In terms of the question of
6 profitability of the defendant's misconduct, number
7 three, let's get our highlighting back -- does the
8 profitability of Philip Morris, Inc. relate to profits as
9 a percentage of revenue?
10 A. Yes, it does.
11 Q. Could you describe for the jury how the relative
12 profitability as a percentage of revenue bears on how
13 profitable -- it says "misconduct," but how profitable a
14 defendant's conduct is that it is alleged forms the basis
15 for damage in a lawsuit?
16 A. Well, whenever --
17 MR. DUMAS: Objection, foundation, Your Honor.
18 THE COURT: Overruled.
19 Go ahead, Dr. Bassett.

20 THE WITNESS: Whenever you want to measure
21 anything, you have to measure it relative to something
22 else. You have to have something to compare it to.
23 So when we talk about this many inches,
24 (indicating), we're thinking of a yardstick that we all
25 are familiar with that we measure distances in. When we

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1 talk about profitability, we have to have some yardstick
2 to measure that profitability against.

3 And what I've done in this chart is show a
4 series of companies, and they're well-known companies,
5 and what their profitability was to compare Philip
6 Morris, Inc.'s profitability to something so that we have
7 a yardstick by which to put it into a context, or a way
8 of measuring it.

9 Q. (BY MR. THOMAS) So, for example, if an individual
10 had the question raised about how profitable their
11 alleged misconduct was, would the amount of money that
12 they make in an enterprise that causes harm to somebody
13 compared to the amount of money that is made in an
14 enterprise that doesn't cause harm to somebody be a
15 relevant consideration in terms of considering the
16 relative profitability much misconduct?

17 MR. DUMAS: Objection, Your Honor. That's not
18 the legal standard.

19 THE COURT: Objection sustained.

20 Q. (BY MR. THOMAS) In regard to evaluating the
21 profitability of defendant Philip Morris for its sale of
22 cigarettes, an item commonly found in a grocery store, is
23 it of demonstrable value in presenting these concepts
24 such as to a jury to show and illustrate the concepts of
25 relative profitability for some of the common articles

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1 that we find when we go to the store?

2 MR. DUMAS: Same objection, Your Honor.

3 THE COURT: May I see the chart?

4 MR. THOMAS: Yes.

5 THE COURT: Do you want to be heard, Mr. Dumas?

6 MR. DUMAS: Do I need to be heard, Your Honor?

7 THE COURT: I have a question that I asked you.
8 Asking me a question doesn't help.

9 MR. DUMAS: I'm sorry, Your Honor, I was being
10 cute.

11 Yes, I think I need to be heard.

12 THE COURT: Jurors, we'll step into chambers to
13 complete this. While we're away, you're free to stretch
14 and chat about anything else.

15 (In chambers).

16 THE COURT: I take it, Mr. Dumas, your
17 objection -- well, you tell me what your objection is to
18 the plaintiff's offering evidence of relative profit as a
19 percentage of revenue when compared to companies like
20 Coca-Cola, Weyerhaeuser Anheuser-Busch, H.J. Heinz, Nike,
21 Colgate-Palmolive and Campbell Soup.

22 MR. DUMAS: My objection is to demonstrative
23 evidence, comparing it to those company or any other
24 company for the following reasons:

25 One that's a collateral are matter;

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1 Two, it is not the legal standard for the
2 imposition of punitive damages.

3 The law states the profitability of the
4 defendant's alleged misconduct, period, it does not say

5 the profitability of the defendant's alleged misconduct
6 relative to some other corporation, or relative to
7 non-misconduct.

8 So I would say that it's collateral, I would
9 say that it is potentially prejudicial, and I would say
10 that it's irrelevant to the inquiry before this jury,
11 standard by which this jury is to consider punitive
12 damages.

13 MR. THOMAS: There are two purposes for this:
14 One is contextual, and that relates to we are presenting
15 a lot of economic concepts to the jury today, and in
16 order to demonstrate concepts of revenues and profits, I
17 felt and do believe that a valid way to do that is to
18 show profit of a number of well-known companies that do
19 not and are not under the umbrella of the Philip Morris
20 banner, which gets us beyond their initial concerns.

21 These are percentages of revenue versus profit
22 that go to explain how it is that the concept of
23 defendant's misconduct from the jury instruction needs to
24 be analyzed by the jury.

25 And if you look at the chart, what you'll see
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1 is that it shows what Philip Morris has done in terms of
2 its performance relative to other common products, and
3 while I understand that this is an area of concern to the
4 defendant, we have used in a number of instances in this
5 case, charts and diagrams, showing a broader type of
6 context than the specific that is being dealt with in
7 order to give the jury context and understanding and
8 education about the specific. And for --

9 THE COURT: It's not hard for a juror to
10 understand \$1.6 billion in net profit. That's not a
11 notion that's beyond the scope of the lay juror.

12 It is not helpful to the juror to compare that
13 to what Coca-Cola makes for purposes of evaluating the
14 defendant's profitability. They don't connect in any
15 relevant or helpful way for the purpose of showing
16 defendant's profitability from its alleged misconduct,
17 which I understand is the proffered purpose.

18 MR. THOMAS: Well --

19 THE COURT: So I'm sustaining the objection for
20 that purpose.

21 MR. THOMAS: All right.

22 Let me just consult with my co-counsel for a
23 minute, and see if I might want to make another approach
24 at this before I give up.

25 (Pause.)

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1 THE COURT: Keeping in mind the general
2 philosophy of the court, that creating error is never
3 helpful.

4 MR. THOMAS: Understood.

5 THE COURT: Going hog is usually hurtful.

6 MR. THOMAS: Understood.

7 (Pause in proceedings.)

8 MR. THOMAS: We understand, and will abide by
9 the court's ruling.

10 THE COURT: Thank you. Here's your exhibit.

11 You can use it for the record in the event you
12 have an appeal, and then maybe you'll get a ruling on the
13 issue eventually.

14 (Open court, jury present.)

15 THE COURT: Jurors, I sustained Mr. Dumas'

16 objection to the extent that if any of you did observe
17 what was on the screen you should disregard it.
18 Mr. Thomas, you may proceed.
19 MR. THOMAS: All right.
20 Q. (BY MR. THOMAS) To go back then just to the
21 Exhibit 171, without going into other companies, does the
22 figure for 1997 of 16.25 percent in terms of profit as a
23 percentage of revenue, from the standpoint of expert
24 economic analysis, indicate marginal or significant or
25 substantial health for this defendant?

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1 A. It's a very high profit rate for companies
2 manufacturing and selling products to consumers.
3 Q. All right. Have you also, at my request, and in
4 connection with the issue of net worth and financial
5 condition, conducted a net worth analysis of the
6 defendant, Philip Morris?
7 A. I have.
8 Q. And in terms of number six, the financial
9 condition, was this the year that you did the financial
10 condition at the present for?
11 A. Correct.
12 Q. And was this year, 1999, from an economic
13 standpoint, substantially different from what it was in
14 years past, or is it pretty much representative?
15 A. Well, it's fluctuated, but I think it's pretty
16 representative over the last few years.
17 Q. All right. Now, just to do sort of an
18 introduction, and then we'll come closer to it.
19 From the standpoint of economic analysis, what
20 is the financial condition of defendant, Philip Morris?
21 A. It's a very wealthy company.
22 Seems like our writing things have disappeared.
23 Q. Sure.
24 THE CLERK: They're all right here.
25 THE WITNESS: Oh, you've moved them. Thank

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1 you.
2 The net worth in March, 1999 --
3 Q. (BY MR. THOMAS) Be sure to keep your voice up.
4 We've got four jurors over here, and --
5 A. Would be in excess of \$17 billion.
6 Q. Now, please, let's revisit the calculation that
7 you did or the description of the calculation that you
8 did at the beginning of your testimony.
9 You said that if you take the share price, you
10 can do a calculation of it to take into account the
11 value, but that that is different from what a person who
12 was like, I don't know, corporate raider or someone
13 trying to do a buyout of the corporation would pay,
14 because there's some premium attached.
15 For purposes of what you did for this jury in
16 this case, which resulted in that figure of 17 billion,
17 did you include the premium which would elevate the value
18 of Philip Morris, or did you exclude the premium?
19 A. I excluded the premium. This would just be based
20 on the share price, so --
21 MR. DUMAS: Your Honor, objection.
22 I have a matter for the court.
23 MR. THOMAS: All right.
24 THE COURT: Mr. Thomas.
25 MR. DUMAS: I apologize.

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1 THE COURT: Counsel, in chambers, please.
2 (In chambers.)
3 MR. DUMAS: I apologize to counsel and the
4 court.
5 Defendant Philip Morris moves for a mistrial.
6 Philip Morris, Incorporated does not own, does not issue,
7 does not sell stock. This witness has just put a number
8 in front of the jury of \$17 billion, which just happens
9 to be, coincidentally -- excuse me -- Counsel, let me
10 finish.
11 MR. THOMAS: Let me interrupt you, because
12 you're not going to --
13 THE COURT: Mr. Thomas, everyone waits their
14 turn, please.
15 MR. THOMAS: Okay.
16 THE COURT: Mr. Dumas.
17 MR. DUMAS: This witness has put a figure of
18 \$17 billion, an estimated net worth in front of this
19 jury. He said that in response to Mr. Thomas' question
20 he excluded premiums, which was just, I think, the
21 phrase was "value of the stock."
22 Well, that's preposterous, because this
23 defendant doesn't have stock. And it just so happens he
24 happened to pick a number that I believe is
25 coincidentally, or not so coincidentally, is the value of
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1 the stock of Philip Morris Companies. Therefore we
2 believe we have been seriously prejudiced.
3 I don't believe this jury can possibly now
4 fairly consider the true net value and true profitability
5 of Philip Morris, Incorporated, and we hereby move for a
6 mistrial.
7 THE COURT: We are going to go take this out in
8 the courtroom, because I want to hear where the witness
9 is going with it, and the basis for the witness' numbers
10 in context of the argument. We'll take argument out in
11 the courtroom.
12 (Open court, with jury.)
13 THE COURT: jurors, I need to work here in the
14 courtroom with the lawyers, so I need you to step out,
15 please to the jury room. Leave your notes on the chair,
16 and don't discuss the case.
17 (Open court, no jury.)
18 THE COURT: To assist me in understanding
19 Mr. Dumas' argument, what I'd like you to do, Mr. Thomas,
20 is to give me an offer of proof of the basis for the
21 \$17 billion number and where you're going with this so I
22 can understand the argument in light of what the evidence
23 may be.
24 Q. (BY MR. THOMAS) In terms of the calculation that
25 you performed of net worth in this case, was that net
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1 worth for Philip Morris, Inc. as opposed to the Philip
2 Morris Holding Company?
3 A. Yes.
4 Q. And just for purposes of this abbreviated
5 procedure, the Philip Morris Holding Company is not the
6 defendant in this case. Philip Morris, Inc. is a part of
7 that holding company; is that correct?
8 A. Correct.
9 Q. And as a part of the standard economic analysis
10 that you do, and into the financial condition of
11 companies, are you accustomed to and have you performed

12 on a number of other occasions, and are you aware of a
13 standard calculation to determine the financial net worth
14 of a company such as Philip Morris, Inc., which is a part
15 of a larger publicly held corporation?

16 A. Yes, there would be several ways you could do it,
17 but it would all come back to the market value of the
18 holding company itself.

19 Q. And is it a standard economic analysis procedure
20 to determine the value of the component member of
21 interest in this case, Philip Morris, relative to that
22 larger holding company in order to establish a net worth
23 for the component member in this case Philip Morris,
24 Inc.?

25 A. Yes.

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1 Q. And would you explain to the judge how it is that
2 such a calculation is commonly performed by economists to
3 show the net worth of that individual member?

4 A. Well, normally you would look at the whole
5 company, Your Honor, and then using a measure of the
6 contribution of the individual unit to the whole company
7 you would calculate what portion of the whole value was
8 attributable to the underlying subsidiary.

9 Q. Did you perform such an analysis in this case?

10 A. Yes.

11 Q. And describe what methodology you used in order to
12 perform that analysis.

13 A. I looked at both sales and profitability, and I
14 valued the underlying subsidiary on the basis of sales,
15 because that was -- gave me a smaller value than
16 profitability. The profitability of the tobacco
17 subsidiary has been higher than some of the other
18 subsidiaries in the company.

19 Q. In fact, and we did not go into -- this objection
20 was sustained, and the relative profitability of other
21 companies, but within the Philip Morris Company -- and
22 judge, this is not something I'm going to necessarily
23 inquire into -- but within the Philip Morris Company, is
24 the tobacco division almost twice as profitable as the
25 non-tobacco division of Philip Morris?

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1 A. Yes.

2 Q. And just for purposes of giving the judge
3 background figures, is it correct that the Philip Morris
4 tobacco income is about twice as much, or two-thirds of
5 the company's profit, but only one-half, approximately,
6 of the company's sales?

7 A. Yes, that's correct.

8 Q. Now, can you and do you intend to explain to the
9 jury how it is that the net worth of this defendant --
10 strike that.

11 Can you and will you explain to the jury the
12 net worth of this defendant without having to go into the
13 value of other companies underneath this corporate
14 holding company umbrella?

15 A. I wasn't planning on discussing the holding
16 company at all.

17 Q. Would it be fair to say that what you are trying
18 to do with regard to this discount factor was just to
19 demonstrate at the outset that a conservative view of
20 calculation of net worth was being used, not one that
21 would take into account some premium that a person who
22 was buying this company would likely have to pay on the

23 open market?
24 A. Correct. I was just trying to say that the share
25 price times the number of shares is a low figure for

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1 value.

2 Q. And were you intending to go into some kind of
3 explanation about the other brands or other companies or
4 anything like that?

5 A. Within Philip Morris Companies?

6 Q. Correct.

7 A. No.

8 Q. Were you, as the next part of the analysis, going
9 to describe for them how it was, without going into those
10 other companies, that you reached the \$17 billion figure,
11 and how that was in fact a fair estimate of the net worth
12 of this company?

13 A. I was.

14 Q. And do you believe that in fact that is a fair,
15 accurate and conservative view as of March, 1999, of the
16 net worth of Philip Morris, Inc., this defendant in this
17 case?

18 A. I do.

19 Q. Have you performed this analysis in other
20 applications as a way to fairly, conservatively, and
21 accurately come up with the net worth of a company which
22 is a part of a larger holding company?

23 A. (Pause.) I have in my research, but not in court,
24 because I don't think that issue has ever come up in
25 court.

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1 Q. And is it a recognized and legitimate part of
2 economic analysis to come up with net worth using this
3 process?

4 A. Yes.

5 MR. THOMAS: I believe that concludes the
6 inquiry, Judge.

7 THE COURT: Mr. Dumas.

8 MR. DUMAS: Just a couple brief questions in
9 aid of objection, Your Honor.

10

11 CROSS-EXAMINATION

12 BY MR. DUMAS:

13 Q. Dr. Bassett, isn't it true that standard,
14 everyday, generally-accepted accounting principles
15 provide that in assessing an estimate of a corporation's
16 net worth, one takes the corporate assets and reduces it
17 by the liabilities pursuant to a standard balance sheet?

18 A. That is true for accounting purposes, but that
19 does not measure the market value of the corporation,
20 because it places no value on the brands or good will
21 that the corporation owns.

22 Q. Okay. And you acknowledged on the proffer that
23 for purposes of expert testimony no court that you've
24 testified in front of has accepted expert testimony of
25 determining net worth of a subsidiary corporation by

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1 making calculations as to the market value of the holding
2 company itself.

3 A. That's not what I said. I said that I've never
4 been asked to testify about that issue, because I can't
5 recall that there was ever this distinction made between
6 the holding company and the subsidiary.

7 Q. Isn't it true, Dr. Bassett, you have not examined

8 a balance sheet for Philip Morris, Incorporated for the
9 year 1997 or 1998?

10 A. I haven't seen a balance sheet. I don't believe
11 they published one that's separate from the holding
12 company.

13 MS. DUMAS: Exactly. Thank you.

14 Your Honor, my objection stands. The
15 methodology that this witness is using prevents any
16 effective or meaningful cross-examination. He has
17 testified that as a foundation as a threshold basis he is
18 estimating the net worth of Philip Morris, Incorporated
19 as it relates to the market value of the holding company
20 in relation to shares and premiums.

21 These plaintiffs filed a motion in limine to
22 preclude evidence regarding other companies, and then
23 they come into court with an expert witness whose
24 testimony is premised on a calculation relative of Philip
25 Morris -- of defendant Philip Morris, Incorporated to one

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1 of the holding company.

2 There's no need for this line of testimony.
3 All counsel and all the plaintiff needs is net profit,
4 operating revenue, operating income, and net profit.
5 They had it, now they insisted on going further, and our
6 motion for a mistrial stands, Your Honor.

7 THE COURT: (Pause.)

8 MR. THOMAS: The question of the financial
9 condition of the defendant is one that calls for as true
10 a picture as can be assembled of what that financial
11 condition is. And where the defendant is one that has
12 the elements associated with it, such as good will and
13 the other factors that are measured in the stock value,
14 in other words, the stock market is the bottom line of
15 what a company is worth in this country, it shows that.

16 If an expert can reference that and use that as
17 a base point from which it can accurately be calculated
18 what it is that the component company's value is, then
19 that is, I would -- and I can go into it even further but
20 I think he already testified, a more accurate picture of
21 the true financial condition of the individual defendant.
22 And it is that figure which, while he hasn't perhaps done
23 it in the context of a court case, is an accepted --
24 acceptable and mainstream value calculation process
25 engaged in by economists.

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1 THE COURT: There are really two issues I have
2 to decide. One is first whether this evidence is
3 admissible at all. And if it's not admissible at all,
4 whether the defendant's motion for mistrial should be
5 granted on the basis that the values presented so far are
6 such that somehow it undermines the ability of the
7 parties to have a fair trial.

8 Yesterday, at the end of the day, there was a
9 particular effort made by the defense to assure that
10 there would not be evidence presented about the financial
11 worth of other Philip Morris entities other than Philip
12 Morris, Incorporated, the defendant.

13 And Mr. Thomas, I don't know how you thought
14 you were going to get in a hypothetical stock price of
15 Philip Morris, Incorporated without getting into that
16 evidence, and I'm disappointed that you proceeded down
17 that road in the presence of the jury in light of three
18 efforts off the record to see that that didn't happen.

19 I wish you had raised this ahead of time,
20 because it seems to me that would have been the honorable
21 thing to do when it was absolutely clear that the
22 defendant objected to evidence about the worth of other
23 Philip Morris Companies, and the court had limited
24 plaintiff's presentation in that regard.

25 I don't know how you can present a hypothetical
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1 value of Philip Morris, Inc. stock to the jury without
2 reference to the other values. You can't get there from
3 here, and you can't do it without depriving the defendant
4 of cross-examination on those very values that have been
5 ruled inadmissible.

6 But that's water under the bridge. We're here
7 now. So now I'm going to assume that you brought the
8 matter to my attention, and I'm going to try to evaluate
9 fairly whether it's admissible.

10 What I'd like to know is whether there are
11 other ways to value this company, and I don't know that,
12 so I'd like to hear it from the witness, and I want to
13 know more about this profit/loss or balance sheet
14 evidence to which Mr. Dumas referenced which is
15 apparently not available, because it's one thing to say
16 keep out evidence of other values and it's another thing
17 to deprive people access to information from which a
18 different methodology could be constructed.

19 So I need some more information, please.

20 MR. THOMAS: All right.

21 Q. (BY MR. THOMAS) In regard to the ready -- we've
22 already dealt with the process that you used and the
23 acceptability of that process.

24 In regard to the alternative calculation that
25 Mr. Dumas suggested, what types of figures was he

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1 referencing in that regard?

2 A. He was referencing standard accounting measures of
3 assets and liabilities, and the difference between those
4 two would be what accountants would usually call book net
5 worth.

6 Now, as I say, that doesn't value any of the
7 brands or any of the good will, it really just values the
8 equipment and other money, other assets, inventory, and
9 subtracts from that the debt.

10 Q. Does that accounting term include things like
11 deductions for depreciation, other tax write-offs, things
12 of that nature?

13 A. Yes.

14 Q. And in terms of providing the jury with evidence
15 about the financial condition of the defendant, does that
16 truly provide the financial condition of the defendant in
17 terms of the value of that company?

18 A. No, it doesn't really value what we would call the
19 sort of going concern value that is reflected in the
20 stock price, which is the expected future earnings of the
21 company.

22 Q. In terms of the concept of the net worth of the
23 company, is that a reflection of the value of the market
24 value of the company?

25 A. Yes.

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1 Q. If the plaintiff in this case was to be limited to
2 proof about the accounting book value, in other words,
3 taking into account their decisions on what they're going

4 to do about depreciation and their schedules and all of
5 their deductions, would that be a more true or less true
6 picture of the net worth of the company for the
7 picture -- for the jury than the method which you chose
8 to use in this case?

9 A. Well, it would be less reflective of the actual
10 value, because it would not, as I say, take account of
11 the very valuable brands that this company has and has
12 developed over the last 30 years.

13 Q. And in terms of the public availability of those
14 accounting books or accounting ledgers, are those things
15 that are readily available?

16 A. Not for Philip Morris, Inc., I have not seen that
17 data, and I don't believe it's publicly available.

18 Q. Is it correct to say that the way that this
19 company works is to file that accounting information for
20 the parent company, but not for the individual company of
21 Philip Morris, Inc.?

22 A. Correct.

23 Q. So in terms of, I guess, A, accuracy, we've
24 already established that the most accurate way to show
25 net worth is the formula that you used, in terms of the

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1 ability to calculate deductions and all of the rest of
2 it, if you were to take the accounting sheets of the
3 parent company, would it be -- would it be readily -- let
4 me come up with a better question --

5 When you examine the financial accounting
6 sheets of the parent company, is it possible to come up
7 with as accurate a view of the actual value of the
8 company, Philip Morris, Inc. through examination of those
9 documents as it is through the method that you used?

10 A. I guess I don't understand the question. Would
11 you --

12 Q. In terms of what you can get as a product from the
13 accounting data of the holding company for purposes of
14 presentation to a jury about the financial condition of
15 the individual defendant, is that a group -- is that data
16 going to result in as accurate a picture as the method
17 that you used?

18 A. No.

19 Q. And just why -- explain to the court why it is
20 that that is not as accurate as what you did. Comparing
21 what's available in the accounting data with what you
22 used.

23 A. Well, if I could use an example, the accounting
24 data measures what has actually been spent and what is
25 owed at the current time, and so it follows generally

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1 accepted accounting principles.

2 It would be like taking what you paid for your
3 house, minus some depreciation, and saying that I paid a
4 hundred thousand for my house 20 years ago, and if I
5 depreciate it over 30 or 40 years it's now has \$50,000 in
6 depreciation, and therefore the net worth is \$50,000.

7 But since you bought the house the value has
8 gone up to \$300,000, and so what is on the books does not
9 give you an accurate picture of what the current net
10 worth is.

11 THE COURT: Are there other -- excuse me. Are
12 there other methods besides the hypothetical share value
13 method that you were about to describe to the jury, or
14 this difference between assets and liabilities which does

15 not reflect good will, brand values, going concern
16 values, are there other methods to value a non-publicly
17 traded company like Philip Morris, Incorporated?

18 THE WITNESS: Yes, Your Honor. You could
19 ignore the actual market value of Philip Morris and look
20 for, for instance, relationships between market value of
21 companies that only had cigarettes, if there are any, and
22 their profits, and then apply those kind of relationships
23 to the actual profits of Philip Morris, Inc.

24 THE COURT: I'm going to suggest an approach
25 for how to deal with this problem.

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1 The question about the admissibilities of this
2 kind of evidence turns upon the statutory criteria
3 regarding punitive damages, which speaks, among other
4 things, in terms of the financial condition of the
5 defendant.

6 Financial condition, it seems to me, is a very
7 broad term, and there are many ways to approach
8 presenting to the jury a true and accurate picture of the
9 financial condition of an entity. It isn't necessarily
10 just its net value, it isn't necessarily its -- the
11 difference between the assets and liabilities, there are
12 a number of factors that it seems to me would -- could
13 appropriately go into financial condition.

14 I've ruled that the plaintiff has made a
15 prima facie case sufficient to present a punitive damage
16 case to the jury, and plaintiff gets to do that in an
17 admissible way. The question about whether there are --
18 there is a basis to include evidence about the financial
19 condition of other Philip Morris Companies, because
20 theoretically there's no other way to value the company,
21 and thus it would be unfairly prejudicial to the
22 plaintiff to restrict the plaintiff to that narrow a
23 view, depends upon indeed whether there are alternative
24 methods, and what information is available.

25 Bearing on that question is what the defendant

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1 discloses and what the defendant does not disclose on
2 that, and what is discoverable, if you will, at this
3 juncture in the trial.

4 It's ten minutes to 12, and I want the parties
5 to think about a constructive way to resolve this problem
6 over the noon break.

7 I'm going to excuse the jury to have them back
8 at 1:30, and I want all of you back at one o'clock for
9 the continuation of the argument about whether it is
10 inadmissible because it's not relevant, or it's
11 inadmissible because it's unfairly prejudicial the
12 evidence about a hypothetical stock value based upon the
13 parent or the holding company.

14 I certainly accept that that may well be an
15 appropriate way to value a company like Philip Morris in
16 a vacuum, but the problem has come up in this case
17 because we had a particular motion and a ruling that
18 there would be no evidence about the financial
19 circumstances of other companies, and this gets it in.

20 So when that ruling was made none of these
21 issues were presented to me, and none of the alternatives
22 can be considered by me really off the cuff, and I don't
23 think the witness it's fair to expect the witness to do
24 that off the cuff either.

25 So I want everyone to be very careful about how

1 we proceed with this, and I want the best answer you can
2 give me at one o'clock, and then we'll go forward.

3 Let the jury go, please, till 1:30.

4 (Recess, 10:55 a.m.)

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1 State of Oregon)
) ss:
2 County of Multnomah)

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4 I, the undersigned Richard L. Smith, Official
5 Court Reporter for the State of Oregon, do hereby certify
6 that I reported the proceedings occurring in the
7 transcript appended hereto; that I thereafter caused my
8 stenotype notes, so taken, to be reduced to typewriting
9 under my direction; and the foregoing and hereto attached
10 pages of typewritten matter, numbered 2 through 85, both
11 inclusive, constitute a true and accurate record of said
12 proceedings, so reported by me, to the best of my skill
13 and ability.

14 Dated this 6th day of July, 1999, at
15 Portland, Oregon.

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RICHARD L. SMITH, RPR-CM CSR
Official Court Reporter

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